SUPREME COURT, U.S.

FILED

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Supreme Court of the United States

OCTOBER TERM, 1966

No. 1206

305 EAST 43RD STREET CORPORATION,

Petitioner,

against

ESKIL L. KARLSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT ON BEHALF OF 305 EAST 43RD STREET CORPORATION

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent, Eskil L. Karlson, urges that the writ of certiorari which the petitioner seeks be denied. As stated on page 1 of petitioner's brief, the writ is sought to review the decision and judgment of the United States Court of Appeals for the Second Circuit, and the denial of a petition for a rehearing or rehearing *in banc,* affirming a judgment entered in the United States District Court for the Southern District of New York on March 29, 1966, in favor of respondent, Eskil L. Karlson, against petitioner, 305 East 43rd Street Corporation, in the amount of $150,000.00,

upon a general jury verdict in an action for personal injuries sustained from a fall down an elevator shaft in a building located in the City of New York and owned by petitioner. The opinion of the United States Court of Appeals, affirming the judgment of the District Court, is reported at 370 F. 2d 467 and is reprinted in Appendix B attached to the brief of petitioner.

Petitioner's post-trial motions were denied by the District Court without opinion.

Jurisdiction

The judgment and later orders of the Court of Appeals were entered as stated by petitioner on page 2 of its brief, with copies attached to petitioner's brief as Appendices (C), (D), and (E).

Petitioner is seeking to review the judgment by writ of certiorari, under Rule 19.1(b) of this Court, which provides for a review on writ of certiorari in the exercise of sound judicial discretion where a Court of Appeals has decided an *important* state question in a way *in conflict* with applicable state law.

Questions Presented for Review

Basically the problem presented is whether this Court will review the decisions and judgments of two Federal Courts below in a diversity action involving solely questions of state law, as to the liability of the owner of a building containing an elevator, for injuries sustained by the respondent herein from a fall down the elevator shaft. This presents, fundamentally: narrow questions of state law as to

the construction and application of certain state statutes and rules; simple substantive questions of state law as to the correctness of the charge of the trial court on questions of proximate cause and as to such matters as burden of proof of contributory negligence; and a question of evidence as to whether a photograph was improperly admitted into evidence which showed a change in the elevator device after the accident occurred.

Comprehended within the foregoing simple and narrow state law issues are certain "subdivided" questions:

1. Whether this Court, in a diversity action involving only the state law of New York, will review the concurring decisions of two Federal Courts below as to the construction, interpretation and effect of New York statutes—and certain rules adopted pursuant to such statutes—and whether a problem of such narrow scope as to state law is a matter of such magnitude and importance presenting special reasons for review that this Court will make a second review as to these questions of construction.

2. Whether this Court, in a diversity action involving only the law of New York, will review the agreeing decisions of the two courts below as to whether the trial court properly instructed the jury, under New York law, on a simple question of proximate causation.

3. Whether this Court, after trial of a diversity action, will review the concurring judgment of two courts below as to whether evidence was improperly submitted to a jury, by way of a photograph, which indicated a change after an accident, where both courts below have held that there was an issue of control of the premises involved so that, as in-

structed carefully by the trial judge, the jury would have to limit their consideration of such evidence to a limited issue of control which also was explained to them.

4. Whether this Court, in a diversity action involving only New York law, will review the concurring decisions and judgments of the two courts below in their application of principles of New York law respecting burden of proof on an issue of contributory negligence.

Statutes Involved

In addition to the statutes recited by the petitioner on page 3 of its brief, there also is involved in this case a Bulletin of the New York City Board of Standards and Appeals, adopted in 1918, being 3 Bull. Board of Standards & Appeals 955 (1918).

Rule 400 of the New York State Industrial Code, defining "interlock," promulgated pursuant to the New York State Labor Law §§28, 255, and contained in Bull. 8 of the State Labor Department, is also involved.

Rule 420, particularly subdivision (f) thereof, requiring an interlock in all manually operated hoisting doors or gates, of the New York State Industrial Code, also promulgated pursuant to the aforesaid sections of the New York Labor Law and likewise contained in Bull. 8 of the State Labor Department, is similarly concerned.

Also involved is §316 of the Labor Law of New York, admitted to be applicable by petitioner.

The text of the 1918 Bulletin of the City Board of Standards & Appeals, of the two rules promulgated pursuant to

the New York Labor Law by the State Labor Department, and §316 of the Labor Law, are set forth in Appendix attached hereto.

Statement of the Case

The basis of federal jurisdiction is diversity of citizenship, and New York law controls as to the substantive rights and liabilities of the parties litigant.

Although the building in which this accident occurred was constructed in 1897, the manually operated elevator involved in the accident was not installed until 1920. Consequently it was later in date than the 1916 Charter of New York as amended by the 1916 laws, contained in Appendix A, page 26 of the brief of petitioner, and also was installed later than the 1918 Bulletin of the City Board of Standards and Appeals (referred to in the opinion of the Court of Appeals, Appendix B, at page 33 of petitioner's brief, and set forth in Appendix, page 23, attached to this brief) which incorporated state law as to regulation of elevators by specifically providing that every elevator within the City of New York shall conform to all provisions of the Labor Law, Building Code, or other laws or ordinances as are applicable thereto. Consequently, when this elevator was installed in 1920, it was installed subject to all the state Labor Law or Building Code provisions which would govern as to elevators.

In 1923, the State Board of Standards and Appeals, pursuant to the authority granted to it by the State Labor Law, adopted New York State Industrial Code Rule 420(f) (see Appendix herein, page 25), requiring all elevators, including this one since it falls within none of the excep-

tions, to be equipped with an interlocking device as defined by Rule 400 (see Appendix, page 23). The Court of Appeals specifically held (Appendix B, at page 33, of brief of petitioner), that this Rule 420(f) requiring such an interlocking device became applicable to the elevator in question here on its effective date of March 1, 1923, so that from that date in 1923, since there was no interlocking device on this elevator it "was operated in violation of the applicable regulations" which, undisputedly, have the force and effect of law.

Counsel for respondent agree with the statement on pages 4, 5, of the brief of petitioner as to how respondent entered the building on Sunday, October 8, 1961, and, in most respects, as to how the unfortunate accident occurred. In this connection, we wish to point out, as is noted by the petitioner on page 5 of its brief, that there was some light by natural daylight coming in through the transom above the street door, so that respondent herein (plaintiff in the trial court and appellee in the Court of Appeals) was not wandering around in complete darkness. We also fully agree with the admission, on page 5 of petitioner's brief, that this elevator was not and had never been equipped with an interlocking device which would have prevented opening of this elevator door unless the elevator car was at the landing in question.

We do not agree with the statement (page 4, petitioner's brief) that the respondent took no precautions of any kind to ascertain whether the elevator car was present when he reached over to attempt to turn on the light. We do not agree with the statements on pages 5 and 6—uttered as statements of fact when, of course, however, they involve questions of construction of New York law—that the con-

struction and maintenance of elevators in the City of New York was governed exclusively by the Administrative Code referred to. Nor do we agree, at all, that this elevator was "legally installed" prior to 1938, inasmuch as this elevator did not have any interlocking device which was required after 1923, pursuant to the "incorporating" regulation of the City Board of Standards and Appeals which was adopted in 1918 before this elevator ever was put into the building.

As part of the "statement of the case" on page 6 of its brief, petitioner makes the legal argument, not a statement of fact, that the Court of Appeals has disregarded both the legislative mandate and the case law of the State of New York in upholding the instructions of the trial court with the result of imposing upon the petitioner a responsibility from which it has been freed by the state law. As our argument below indicates, this is wrong; moreover, the points of state law involved are narrow and not the type of question for review of state law in which this Court will become involved by employing its discretionary power to grant the writ to decide great and serious issues.

Even farther from the scope of a granting of the writ is another legal argument (also contained on page 6 as part of the "statement of the case") where the petitioner contends that both Courts below were wrong in permitting the introduction of a photograph which happened to show that, after the accident, an interlocking device had been installed on the elevator door. In the first place, this is not a statement of fact but concerns a mere ruling on evidence, largely discretionary by the trial court, which the upper court on careful review found was not only not prejudicial, but not even erroneous. Furthermore, the in-

troduction of this evidence did not violate New York law, did not violate federal law, and was not—although so stated by petitioner—in conflict with the decision of this Court in the case of *Columbia & Puget Sound R. Co.* v. *Hawthorne* (1892), 144 U. S. 202, 36 L. ed. 405 which involved the permission into evidence of changes in a shaft around which a pulley revolved, after an accident. In that case this Court followed the usual general rule—which no one disputes under New York law or otherwise—that evidence is usually inadmissible to show subsequent repairs or changes. But the instant case does not involve the general rule. Rather it entails the equally well-known exception to that general rule (annotation, 170 A. L. R. at p. 43, supplemented in 64 A. L. R. 2d at p. 1311, §7), fully established by New York law (41 N. Y. Jur., Negligence, §106, p. 135, n.3 citing fourteen New York cases), that such evidence is admissible if it bears on a disputed issue of control. Showing the correctness of the rulings below, we respectfully refer this Court to the opinion written by Judge Medina, who is one of the greatest experts in the country on New York law, the rationale of the Court of Appeals on this point appearing in petitioner's Appendix B at pages 35 and 36 thereof.

Argument Against Granting the Writ

Petitioner starts off, at the bottom of its page 6, with the wild statement that the agreeing courts below have, by pure judicial fiat, made applicable to elevators installed in a building before 1938, the rules of the New York State Board of Standards and Appeals. This leap to the emotional conclusion that these rulings were based "on pure judicial fiat" is ridiculous. What the courts below did,

and did correctly, was to apply to this elevator, pursuant to a 1918 City Board Bulletin, which preceded the installation of the elevator, a State Board of Standards Rule as to interlocking devices which, as the Court of Appeals correctly and clearly pointed out, made the installation of this elevator a violation of safety rules from 1923 on.

Contrary to the somewhat inflammatory language employed by the petitioner on pages 7 *et seq.*, of its brief, there was no disregard of the language of the New York statutes, of 1916 or of 1937, nor was there any "unabashed exercise of judicial legislation." The opinion of the Court of Appeals, it is submitted, fully answers all arguments made by petitioner on pages 7, 8. Moreover, any rule of state law as to what "legally installed" means with respect to an elevator, involves only a somewhat narrow and specific point; and this Court should not undertake the burden of attempting to reassess the ruling of the two lower courts—both experts on New York law—as to what these statutory provisions and these Rules mean. With respect to the cases cited on page 9 of petitioner's brief, we wish to point out that the *Florentine* case, 340 F. 2d 239 (1965), the *Moran* case, 22 App. Div. 2d 779, 254 N. Y. S. 2d 33 (1964), and similar authorities were all cited to the Court of Appeals by the present petitioner on page 20 of its brief for that Court, and were distinguished for that Court by the present respondent—the appellee in that Court—in his brief before that Court, on page 14 thereof. This case of *Moran* v. *Abercrombie & Fitch Co.* (1964, First Dept.), 22 App. Div. 2d 779, 254 N. Y. S. 2d 33, really rests on the point that the testimony of the expert in that case did not sustain a finding of custom and practice therein. The true record in that case indicates that

there was a failure in the manner and matter of proof. There is no actual holding by the court in any way as to the requirement of a device on elevators, but merely a recital as to what an expert admitted was a proper installation. Furthermore, without any exception, the trial court therein had charged that the elevator was a proper installation and that there were no violations. But in any event, the question of state law is an extremely narrow one and it was correctly determined by both the trial court and by Judge Medina for the Court of Appeals.

Next, on page 9 of its brief, the petitioner flatly states that federal courts are required to apply state law even as announced by a court of first instance. This has little relevance to the instant brief since multiple decisions of courts of first instance in support of petitioner's position are not cited—but even so, the rule is stated too broadly. The true rule was stated by this Court in *King* v. *United Commercial Travelers,* 333 U. S. 153, 92 L. ed. 608, 68 S. Ct. 488 (1948), where Chief Justice Vinson carefully pointed out that trial court decisions are not an authoritated exposition of the "law" of a state where they do not have to be followed by courts of coordinate jurisdiction and may be ignored or disagreed with. As was pointed out in that case, 333 U. S. 153, at 161, 92 L. ed. 608 at 613: "It would be incongruous indeed to hold the Federal Court bound by a decision which would not be binding on any state court." Additional cases on the same point will be found in 36 C. J. S. Federal Courts, §174 (2), especially cases cited at page 410. That lower and trial court decisions are of only persuasive, but not controlling effect, upon another coordinate court under the law of New York, is clearly indicated in 1 Carmody-Wait 2d, Encyclopedia

of New York Practice, Chapter 2, "Courts and Their Jurisdiction," §2:58.

Again we point out that the Court of Appeals reasoned correctly in its construction and interpretation of the various New York statutes and Rules, notwithstanding the adverb "speciously" and the name calling indulged in by petitioner on pages 9, 10, 11 of its brief. At page 10 of its brief, petitioner apparently lays great stress on the case of *McCabe* v. *MacKay*, 253 N. Y. 440, 171 N. E. 699 (1930). An examination of this short opinion by Chief Judge Cardozo shows that it gives no comfort to petitioner herein. That case involved a duty imposed by the City Building Code as to installation of artificial light in the hall of a building, and the Court correctly held that it only applied to office buildings erected after its date, by the specific provision of a section of the Building Code therein involved. This has no application to the instant case, where, as the Court of Appeals pointed out, the elevator in question in this situation was in violation of the state Rules—the controlling rules in this case since the City has not superseded them—from 1923 on until the date of this unfortunate accident.

On page 11 of its brief petitioner lays great stress on the fact that no violation was placed upon the elevator since the time that petitioner has owned it, 1939. Similarly, on page 4, petitioner had pointed out that many thousands of such elevators are still in use in New York City. Thousands of "wrong installations" not complying with the law and the safety regulations do not make a violation into a right. If there are thousands of elevators without these interlocking devices, we submit that the owners thereof are merely fortunate that a great many persons have not been killed

or injured through failure to comply with the safety laws and rules. One might just as well argue that a driver of a vehicle driving down a street on the wrong side at 100 miles an hour, and causing an accident, should not be held liable for negligence because (1) he has been accustomed to driving that way for a long time—since 1939—without being arrested, and (2) because dozens of other people also drive 100 miles an hour down the wrong side of the street without any action being taken against them by way of sanctions, either civil or criminal.

Equally absurd is the contention, on page 11 of petitioner's brief, that because a witness testified that elevators erected prior to 1931 were not required to have a "parking device" as a matter of regulation, no interlock was required. It should be obvious, even to petitioner, that such an "expert" doesn't make the law, and that any lack of enforcement of a law will not affect either its existence, or a violation of it giving rise to evidence of negligence. As noted above, a series of violations does not cure any one of them.

The Proximate Cause Issue

On pages 12 and following of its brief, petitioner seeks to bring before this Court, as an important question which justifies the granting of a writ of certiorari, a contention that the two courts below made a mistake as to the trial court's instructions to the jury in the law of New York on proximate cause. Involved here is a simple question of state law, not a complicated one; and since it involves the correctness of the trial court's instructions in use of particular words or phraseology, it is also a narrow and relatively unimportant question of state law. It also involves, fundamentally, a question of fact which this Court will not

review over again. As the Court of Appeals held, in properly disposing of this rather inconsequential point, there was no error in the instructions on the subject of causation and New York law requires no magic formula or particular statement of the rule. If anyone is familiar with aspects of New York law such as are here involved, it is Judge Medina who wrote the opinion.

It is somewhat unbelievable, but petitioner is urging that, as a matter of law, the conduct of a co-employee, one Epstein, in placing the key to the elevator door back under the staircase—so that it was available for use by the respondent—instead of keeping it on his person when he had taken the elevator away from the first floor landing, constituted a complete intervening cause, breaking the chain of causation of petitioner's negligence in failing to have an interlocking device on the elevator.* It was certainly foreseeable—that when petitioner made this key freely available and also left an interlocking device off the elevator, that someone, after using the key, would put it back in its place where it was supposed to be kept.

The law of New York is clear, as stated in 41 N. Y. Jur., Negligence, §38, that the doer of an act is liable for harmful consequences brought about by intervening independent forces if their operation might have been reasonably foreseen, and that in such case there is no break in the chain of causation of such a character as to relieve the actor of liability, even though the intervening forces are deliberate and independent, but innocent acts of a human being.

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* This argument is made notwithstanding the fact that petitioner concedes that §316 of the Labor Law (Appendix 26) places a non-delegable duty upon the owner of a tenant-factory building. The act complained of as intervening is that of an employee of the tenant in the course of his employment.

A leading New York case which makes this clear is the frequently cited decision of *Carlock* v. *Westchester Lighting Company* (1935), 268 N. Y. 345, 197 N. E. 306. That case resulted in a reversal of a judgment for a defendant below, and involved a violation of a safety regulation, in this particular instance as to electric wires. Applying the well-known New York rule that neglect to obey the prohibition of a law or to perform its duty prescribed is some evidence of negligence to be considered by a jury in an action brought by one for whose protection the legislation was enacted to recover for any injuries of the character which the regulation was designed to prevent, the court further held, at page 349 of 268 N. Y., that the violation would seem to have been a proximate cause of the death or so the jury might have found, noting that several acts may occur to produce a result, one or more of which may be the proximate cause. Then the court added, at page 350 of 268 N. Y., page 308 of 197 N. E.: "Where harmful consequences are brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, there is no break in the chain of causation of such character as to relieve the actor from liability. This is so, even though they are deliberate and independent, but innocent, acts of a human being."

The first of these two sentences was quoted and applied, and with emphasis added, in the leading case of *Kingsland* v. *Erie County Agricultural Society* (1949), 298 N. Y. 409, 84 N. E. 2d 38, 10 A. L. R. 2d 1, an explosion case. The court, using the foregoing language, held that the issue of proximate cause in an explosion case where a child was injured was properly left to the jury, further that it could not hold as a matter of law that the conduct of the child's

mother broke the chain of causation, and that that also, at most, was a matter of fact for the jury.

Applying these principles here, it is obvious that the trial court correctly instructed the jury as to the effect, if any, of Epstein's activities, and that the Court of Appeals correctly affirmed.

There is nothing novel about the New York law on these problems. The law is simple and pretty well settled, the issues being primarily factual. To the same basic effect as the New York decisions already cited, see American Law Institute, Restatement of the Law, Torts 2d, §§447, 449, and the numerous cases cited in the Appendix thereto at pages 220 *et seq.*, 245 *et seq.*

An important New York case which directly follows the Restatement principles is *Foley* v. *State* (1943, Fourth Dept.), 265 App. Div. 682, 41 N. Y. S. 2d 256, at 260, citing with approval the same sections in the original Restatement of Torts, and the *Carlock* case, *supra.* In holding that the State could be held liable for failure of a red traffic light, it was declared apparent that the absence of the red light not only contributed to an accident that followed, but it was reasonably foreseeable that some such accident would occur without such red light functioning. The court added that the mere fact that the acts of drivers of cars intervened "did not necessarily create a superseding cause"; that this was particularly so where the original wrongdoer could have anticipated that the intervening acts might naturally follow the original wrongful acts; and that the mere fact that the negligence of the State alone was not enough to produce the injury, without the cooperation of the drivers, did not break the chain of causation or relieve the State from liability. So, too in this case, the mere fact that

Epstein put the key back "did not necessarily create a superseding cause," particularly where petitioner, the original wrongdoer, could have anticipated that someone using that key might have put it back and that such might naturally follow petitioner's original wrongful act in not having the interlocking device to make the elevator and its shaft safe.

On pages 12, 13, in order to fault the two lower courts in New York law application, petitioner lays particular stress on the *McLaughlin* and *Rivera* cases. This confidence is misplaced, since these cases do not render erroneous the instructions of the trial court or the affirmance by the Court of Appeals.

McLaughlin v. *Mine Safety Appliances Company*, 11 N. Y. 2d 62, 181 N. E. 2d 430 (1962), involved an instruction as to intervening cause and foreseeability which was held erroneous. The case is distinguishable clearly, because the jury could have believed that the act of the fireman there, which might have been found to have been an intervening cause, might have deprived the nurse who was using the defendant's heating blocks of any opportunity she might have had to read the instructions printed on the containers (for the small print of which the defendant was sought to be held liable for failure to warn); and the jury also might have found that the fireman actually activated these blocks and had turned them over, uninsulated, to the nurse for her use. As the reviewing court noted, the trial court should have charged that if the fireman did so conduct himself, without warning the nurse, *his negligence was so gross* as to supersede the negligence of the defendant and thus to insulate it from liability. Moreover, the jury might have found that the fireman not only had the means to warn the nurse, but further, by his actions, he prevented any warning

from reaching her, and indeed, that he actually had some part in the improper application of the blocks—conduct which could not have been foreseen by the defendant. Obviously, there are two distinctions. In the first case, the mere act of Epstein in restoring the key to its usual place of repose, if negligent, cannot be said to be so gross as to supersede the negligence of the petitioner in failing to have the interlocking device on the elevator; furthermore, everything that Epstein did was easily and readily foreseeable.

Wide of the mark, also, is *Rivera* v. *City of New York* (1962), 11 N. Y. 2d 856, 227 N. Y. S. 2d 676, 182 N. E. 2d 284, where, in a memorandum decision, the court held it clear that defendant's asserted wrongdoing was not the proximate cause of the accident. The defendant there was sued for asserted defective condition of the plumbing and of a bathtub, after a child slipped and fell into a tub filled with very hot water. The court noted that the hot water created specific injuries for which the damages were sought, but held that it did not cause the intervening act which was deemed not foreseeable. The act not foreseeable was that the child was attempting to balance itself on the curved edge of the bathtub, and fell in because of the slipping of a wet boot. Obviously, a landlord furnishing plumbing and hot water cannot reasonably foresee that someone would attempt to walk around the curved edge of a bathtub. But the defendant-petitioner, which here furnished the key for use by the tenant, could easily foresee that someone like Epstein, after using the key, would return it to its intended place of repose, with the result that another user, like the unfortunate plaintiff-respondent herein, might be injured or killed from falling into the elevator shaft because no interlocking device had been employed.

There is no doubt that this point entails no complicated question of New York law, and that, moreover, it was correctly decided below. It must be kept in mind that the failure of petitioner to have this interlocking device was the original and constantly continuing negligent act—it was either the sole act of negligence, or it was concurrent with any activity of Epstein in replacing the key, without any break in the chain of causation.

Evidence

Where is there any important and significant question of state law, in the evidence point (previously mentioned in this brief) raised again by petitioner on pages 14 *et seq.*, of its brief? The contention is that the lower court erred, and that the Court of Appeals affirmed the error, in permitting admission of a photograph indicating that after the happening of the accident, the petitioner did install an interlocking device.

We have already discussed the *Hawthorne* case, 144 U. S. 202, which merely followed the general rule, as above stated, that no one disputes, that evidence is inadmissible merely to show a change or repair after an accident. But as noted above (page 8) all this was properly explained by the Court of Appeals, in its opinion, as indicated in petitioner's Appendix B, at pages 35 and 36. The trial judge, by instruction, made it clear to the jury that any use of such so-called evidence was related to an issue of control; and, as the Court of Appeals declared, the issue of control had not been completely removed from the case. The point is really an immaterial one, and certainly not the type of issue upon which certiorari is granted by this Court to settle important and outstanding questions of law.

Contributory Negligence

Another minor question of state law, in fact primarily a question of fact, which petitioner nevertheless seeks to have this Court review, is as to the possible contributory negligence of respondent and his burden of proving that the injury did not result from negligence on his part. This is raised on pages 16, and following, of petitioner's brief. Moreover, to pinpoint the insignificance of the claim, petitioner itself admits, at page 19 of its brief, that it did not challenge the charge to the jury on the question of contributory negligence. It is seeking to have this Court determine on a second appeal as to the weight of evidence, which this Court does not review, whether the plaintiff-respondent had carried the burden of proof imposed upon him to prove his freedom from contributory negligence. One review of the facts is all to which petitioner is entitled.

In this case, the point as to proof of freedom from contributory negligence was obviously so insignificant to Judge Medina and his associates on the Court of Appeals, that the matter was disposed of summarily in one sentence in their opinion, when they stated (petitioner's Appendix B, at page 36): "We think the issue of contributory negligence was clearly for the jury to determine." If there is any issue of state law which this Court will not review, and which does not constitute an "important question of state law," it is one as to sufficiency of evidence where both courts below have held in favor of plaintiff on an issue of contributory negligence.

CONCLUSION

Not only is the decision here not in conflict with the *Moran* case (1964), 22 App. Div. 2d 779, 254 N. Y. S. 2d 33, previously discussed herein and which was cited to the Court of Appeals in the briefs of both parties in that court, but no question of state law of any great significance or importance whatsoever is presented by this record. Petitioner has had a fair trial. It was tried by a jury which unanimously found against it on a jury charge which was found to be completely free from error. After careful consideration, the judgment against it was unanimously affirmed by a Court of Appeals consisting of Judges Medina, Friendly and Smith. One of the leading authorities on New York law of this century is Judge Medina. Certainly he and his distinguished associates were cognizant of the New York law questions presented by this record. They gave them careful consideration, and decided them correctly. The petitioner is seeking to have this court review narrow questions of state law, relatively insignificant questions of state law, questions of fact, immaterial rulings on evidence already decided correctly by two lower courts, and questions as to weight of evidence. This is exactly the type of review which will not be made by this Court in the exercise of its discretionary functions with respect to the writ of certiorari.

For the foregoing reasons, the petition for certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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Dated: New York, New York
April 26, 1967.

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APPENDIX A

Additional Bulletins and Rules Involved

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Every elevator * * * within the City of New York, in addition to conforming to all provisions of the labor law, building code or other laws or ordinances as are applicable thereto, shall comply with the provisions of these rules. 3 Bull. Board of Standards & Appeals 955 (1918).

State Labor Department Rules

Part 1—Power Driven

Definitions

(See Part II for Definitions of Hand Power Elevators, Hand Power Dumbwaiters and Hand Power Hoists.)

Rule 400. Whenever used in these rules "approved" means approved by the Industrial Commissioner.

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"Interlock." An interlock is a device which shall:

1. Prevent the movement of the car:

(a) Unless only that hoistway door or doors, opposite which the car is standing, are closed and locked (Door Unit System); or

(b) Unless all hoistway doors are closed and locked (Hoistway Unit System).